SUPREME COURT, U.S.
FILED
NOV 22 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 622.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, *et al.*,

Petitioners,

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fourth Circuit.

ROBERT R. MACMILLAN,
621 Bank of Commerce Building,
Norfolk 10, Virginia,

WAYLAND K. SULLIVAN,
Standard Building,
Cleveland 13, Ohio,

RUSSELL B. DAY,
622 Keith Building,
Cleveland 15, Ohio,

HAROLD C. HEISS,
622 Keith Building,
Cleveland 15, Ohio,

Attorneys for Petitioners.

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To the United States Court of Appeals, Fourth Circuit.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners are the Brotherhood of Railroad Trainmen, Lodge No. 514, Foy K. Vaughan, individually and as Local Chairman of such Brotherhood, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and C. W. Matthews, individually and as General Chairman of such Brotherhood. The petitioners pray that a writ of certiorari issue to the United States Court of Appeals, Fourth Circuit, to review a judgment of that Court entered in a case entitled *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, Lodge 415, et al.*, Docket No. 7416, reversing a judgment for the petitioners rendered by the United States District Court for the Eastern District of Virginia, Norfolk Division, and ordering that a permanent injunction be entered against the petitioners.

OPINIONS BELOW.

The opinions rendered by the District Court and by the Court of Appeals, Fourth Circuit, have not as yet been officially or unofficially reported. Copies of these opinions are included in the appendix to this petition.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). The judgment of the Court of Appeals was entered on August 23, 1957. A petition for rehearing was filed by the petitioners and was overruled on September 30, 1957.

QUESTIONS PRESENTED.

1. Whether a strike by the employees of a carrier engaged in interstate commerce is lawful when the cause of the strike is a dispute over the interpretation and application of a provision in a collective agreement governing the employees' working conditions.

2. Whether a strike by railway employees, which is lawful when called, may at a later time be converted into an unlawful strike by the act of the carrier-employer submitting the dispute, which led to the strike, to the National Railroad Adjustment Board.

STATUTES INVOLVED.

The provisions of the Railway Labor Act [1] pertinent to the questions presented by this petition are as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or work-

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[1] 45 U. S. C. Sec. 151, *et seq.*

ing conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. * * *

The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (45 U. S. C. Sec. 153, First (i) and (m)).

STATEMENT OF THE CASE.

The respondent is a switching terminal and belt line railroad serving the industries in the Norfolk, Virginia, area. (Appellant's App., p. 10.) It is engaged in interstate commerce and is subject to the Railway Labor Act. The center of the carrier's lines is the Berkley Yard located in South Norfolk, Virginia. From this yard, branch lines extend in several directions to serve concentrations of industries. One such branch crosses the Elizabeth River to a yard in Portsmouth, Virginia, known as the Port Norfolk Yard.

Prior to 1956 engine crews that were to work at Berkley Yard reported for duty at the Port Norfolk Yard in Portsmouth, where the locomotives were serviced. They then proceeded by locomotive over the lines of the carrier

to Berkley Yard or to other points of work assignment. Normally, the locomotive would be returned by the crew to the Port Norfolk Yard at the end of the work shift. This traveling on the locomotive was at the carrier's expense, as the crew would be on a pay status from the beginning of their starting time at Port Norfolk Yard until they were relieved from duty at the same place. (Appellant's App., pp. 20-21.)

One other place on the respondent's property where crews regularly reported for duty and also ended their round of duty is known as Sewells Point Yard.

The enginemen in the yard crews are represented for the purposes of the Railway Labor Act by the Brotherhood of Locomotive Firemen and Enginemen. The switchmen and other yardmen are represented by the Brotherhood of Railroad Trainmen. The collective agreements between the respondent and the two Brotherhoods provide that the respondent will maintain locker rooms, showers and other facilities at the points where the employees are required to report for duty or be relieved from duty.

Each of the collective agreements also contains a rule which provides, in substance, that there will be certain designated points at which employees will report for duty and be relieved of duty. (Appellant's App., pp. 64-67.) The correct interpretation of these rules became the subject of dispute between the respondent and the Brotherhoods after the respondent had replaced its steam locomotives with Diesel locomotives and then recognized that there would be economic advantages in having the crews which worked in the Berkley Yard report for duty and go off duty at this yard rather than at the Port Norfolk Yard. (Appellant's App., p. 34.) For some members of these crews this change would require them to travel a minimum of ten additional miles daily and also incur the added ex-

pense of furnishing their own transportation. (Appellant's App., pp. 2, 36; Appellees' App., pp. 1, 3, 38-41.)

The Brotherhoods asked the respondent to assume all, or at least part, of the additional burden that would be put upon the employees by changing the place of reporting for duty from Port Norfolk Yard to Berkley Yard. (Appellant's App., p. 36.) The respondent declined the request.

It is unnecessary to detail the positions taken and the arguments urged by the respective parties during the dispute. (Appellant's App., pp. 63-73.) It will suffice to say that the Court of Appeals held that the dispute must be classified as a "minor dispute," as that term is sometimes used in the railway industry, and, hence, referable by either of the parties to the National Railroad Adjustment Board for decision.

The parties were unable to settle their dispute by direct negotiation, and on April 26, 1956, the respondent posted notice on its bulletin board that the place for the reporting and relief of six crews would be changed from Port Norfolk Yard to Berkley Yard effective May 2, 1956. On April 27, 1956, the Brotherhoods notified the National Mediation Board that the employees represented by the Brotherhood would withdraw from service in a general strike on May 2, 1956. The National Mediation Board proffered its mediation services on the grounds that a "labor emergency" [2] was found to exist. (Appellees' App., pp. 8-9.) A mediator arrived on the scene and attempted for several days to bring the parties to agreement, but without success. (Appellant's App., p. 37.)

In July, 1956, the National Mediation Board invited the parties to Washington to continue the mediatory

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[2] 45 U. S. C. Sec. 155, First.

process. (Appellant's App., p. 17.) An agreement settling the dispute was formulated late on July 23, 1956, by the mediator and submitted to the parties. (Appellant's App., p. 23.) The petitioners approved the agreement and signed it on July 24. The respondent's president indicated approval of the language of the agreement but left Washington late on July 24 to return to Norfolk to further consider the terms of the proposed agreement. (Appellant's App., pp. 71-73; Appellees' App., pp. 15-17.) The next day, July 25, the respondent's president advised the Mediation Board that the respondent was rejecting the mediation agreement. (Appellant's App., p. 24.) On August 16, 1956, the Mediation Board advised the parties that it was withdrawing from the case. (Appellant's App., pp. 5, 30.)

More than a month later, on September 21, 1956, the respondent posted notice that effective September 26, 1956, five crews would change their place of reporting for duty and being relieved from duty, from Port Norfolk Yard to Berkley Yard. On September 24, 1956, the Brotherhoods notified the respondent that its employees in switching service would withdraw from service on September 26, 1956. On the same day that the strike notification was given to the respondent, to wit, September 24, 1956, the respondent filed suit in the Circuit Court of the City of Norfolk and obtained an injunction ordering the employees not to strike. The next day the respondent ordered certain of its switching crews to henceforth report for duty at Berkley Yard. The employees complied with this order, in obedience to the injunction. (Appellant's App., pp. 40, 42.) This suit was thereafter removed to the United States District Court for the Eastern District of Virginia, Norfolk Division.

Neither the respondent carrier nor the Brotherhoods had submitted the dispute to the National Railroad Adjust-

ment Board at the time that the respondent went to court on September 24, 1956, and obtained the injunction against its employees.

The trial of this case began in the District Court on October 9, 1956; was continued to October 10, and concluded on that date. Final argument was heard on October 24, 1956. The dispute had not been submitted to the National Railroad Adjustment Board by the latter date.

The case was decided by the District Court on January 25, 1957. Regarding the submission of this dispute to the Adjustment Board, the District Court made the following observation:

> "While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the Carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction." (Appellant's App., p. 53.)

The District Court held that "the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved." The injunction was reinstated, however, upon motion by respondent and the filing of its notice of appeal. (Appellant's App., pp. 60-61.)

The Court of Appeals reversed the judgment of the lower court and ordered that the employees be permanently enjoined from striking because of the dispute over the shifting of the place to report for duty.

The core of the reasoning by which the Court of Appeals arrived at the decision that the threatened strike should be permanently enjoined is contained in the following quotations from the Court's opinion:

> "Since the dispute is a minor one subject to final determination by the Adjustment Board, to which it

has been submitted by petition of the carrier, the threatened strike should be enjoined, *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Terminal Railway Co.*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 722. * * *

"Since the issue framed and processed by the parties was a 'minor' one, resort by the Brotherhoods to a strike was not lawful and a permanent injunction should be entered."

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided a Federal question in a way that squarely conflicts with the decision of this Court in the case of Manion v. Kansas City Terminal Railway Co., 353 U. S. 927.

The *Manion* case and the *Chicago River* case[3] presented substantially identical facts to this Court, save for one highly significant difference. This difference was that in the *Chicago River* case, after the dispute had been progressed in conferences up to and including the chief operating officer of the carrier designated to handle such disputes, and after the Mediation Board had assumed jurisdiction of the dispute and had exhausted, without success, its mediatory efforts to bring the parties to agreement, the carrier then made an *ex parte* submission of the dispute to the National Railroad Adjustment Board. The Board docketed the dispute in its usual manner. Four days later the employees elected to strike over the dispute notwithstanding the fact that the Adjustment Board had assumed jurisdiction of the dispute. The dispute was a so-called "minor" dispute, involving the interpretation of a collective agreement.

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[3] *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30.

The *Manion* case was also concerned with "minor" disputes. The disputes in this case were processed through conferences, and then the National Mediation Board entered upon the scene and tried, without success, to bring the parties to agreement. Neither party desired to submit the disputes to the Adjustment Board. The employees thereafter announced their intention of withdrawing from service until such time as the disputes were satisfactorily settled.

Thus, the one essential fact that differentiated the *Manion* case from the *Chicago River* case is that in the latter case the announced determination by the employees that they were going to strike occurred *after* the Adjustment Board had assumed jurisdiction of the dispute. In the *Manion* case the announced intention to strike was not a threat to the authority of the Adjustment Board. Hence, in the *Manion* case this Court ordered the court below to vacate the injunction issued to restrain the employees from striking. In so ruling this Court rejected the contention so vigorously urged by the carriers that the Congress had taken from railway employees the right to strike when the cause of the strike is a dispute involving the interpretation or application of a collective agreement.

The decision by the Court of Appeals in the instant case is squarely in conflict with the law as enforced in the *Manion* case. *The factual situation that obtained when the respondent in the instant case resorted to the Virginia court for an injunction to interfere with its employees' announced intention to strike is exactly the same as in the Manion case.*

When the Court of Appeals held, in effect, that the submission of a dispute to the Adjustment Board by the carrier, though made long after the right of the employees to strike had matured under Railway Labor Act procedure

and after the employees would have withdrawn from service had they not been stopped by injunction, has the legal effect of converting what began as a lawful strike, into an unlawful strike, this conclusion is contrary to the decision in the *Manion* case. In short, the law as announced by the Court of Appeals is that a strike, though lawful when begun, can be made unlawful by the act of the carrier belatedly submitting the dispute underlying the strike to the Adjustment Board.

When this Court qualified its mandate in the *Manion* case by stating that its order to the Kansas City Court of Appeals to vacate its judgment was without prejudice to the power of the Kansas Court to reinstate the injunction against the employees if the dispute were submitted to the Adjustment Board *within a reasonable time* after the mandate went down, the alternative result under the mandate is clear. This would be that the injunction could *not* be lawfully reinstated if the submission of the dispute were not made *within a reasonable time* after the mandate reached the lower court.

We assume that there would have been no reason for this Court to restrict the power of the lower court to reinstate the injunction, by prescribing that it might be done only if the submission to the Adjustment Board were made within a reasonable time, if the law were as the Court of Appeals assumed it to be in the instant case. We understand that the law as implied and enforced in the *Manion* case does *not* contemplate that a carrier shall have the right to explore the available terms of settlement through negotiation and mediation; then stand by to see whether the employees can muster enough support and strength to mount a successful strike, and if the employees can demonstrate that they have the necessary strength and determination to wage a contest with some prospect of

success, the carrier may thereafter, at its leisure, convert the lawful strike into an unlawful strike by the simple process of making an *ex parte* submission of the dispute to the Adjustment Board.

2. The Court of Appeals has decided an important question of Federal law in a manner that will seriously affect the interests of all railway employees in the United States. This decision, if it stands and is followed by other courts, will destroy the success of the collective bargaining process to the extent that the Railway Labor Act depends upon this process as a means of disposing of "minor" disputes in the railway industry.

No right is more important to the welfare and the progress of organized labor than the right of employees to withhold their labor when relations between the employees and their employer reach a state where striking appears to be a necessary course of action. It is almost a truism to say that true and effective collective bargaining can occur only when the parties are possessed of substantially equal economic strength.

The *Chicago River* and *Manion* cases were the first formal attempts by the carriers during the more than twenty years following the enactment of the 1934 amendments to the Railway Labor Act, to sell the proposition to the courts that Congress outlawed the previously existing right of railway employees to strike over an accumulation of so-called "minor disputes." Since the Congress did not incorporate language in the Railway Labor Act stating that the right to strike over "minor disputes" was being withdrawn from employees, the conclusion contended for by the carriers had to be founded upon the argument that the fact that the Adjustment Board was established with authority to decide "minor disputes" when submitted

by either party to the dispute, must be interpreted as a Congressional determination to take from employees the right to strike in all instances where the dispute leading to the strike comes within the scope of the Adjustment Board's jurisdiction.

This argument was summarily disposed of by the per curiam opinion of this Court in the *Manion* case. The right of employees in the railway industry to strike when a dispute with their employer seems to necessitate such action was thus preserved by this Court, except in the situation presented by the *Chicago River* case. *The right to strike as preserved by the Manion case will be deprived of all practical importance if the decision by the Court of Appeals in the instant case is not overthrown by this Court.* This is true for a reason which we believe will be obvious to the Court. If the right to strike over so-called minor disputes is subject to nullification at any time by the action of the employer submitting the dispute to the Adjustment Board, the right will be without substance. The importance to railway employees of the decision in the *Manion* case will have vanished.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be granted.

ROBERT R. MACMILLAN,
621 Bank of Commerce Building,
Norfolk 10, Virginia,

WAYLAND K. SULLIVAN,
Standard Building,
Cleveland 13, Ohio,

RUSSELL B. DAY,
622 Keith Building,
Cleveland 15, Ohio,

HAROLD C. HEISS,
622 Keith Building,
Cleveland 15, Ohio,

Attorneys for Petitioners.

November 23, 1957.

APPENDIX.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION.

(Dated January 25, 1957.)

On September 24, 1956, the Circuit Court of the City of Norfolk, Virginia, granted to plaintiff, Norfolk and Portsmouth Belt Line Railroad Company (hereinafter referred to as "Belt Line" or "carrier"), a temporary injunction directed against the Brotherhood of Railroad Trainmen, Lodge No. 514, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and two defendants in their individual capacities and as local Chairmen of the respective Brotherhoods. The injunction restrained the parties from "calling, ordering, authorizing, encouraging, inducing, approving, continuing, starting, or permitting any strike or collective work stoppage" on the Belt Line, and further restrained defendants from "in any manner interfering with, inducing, or endeavoring to induce, any person employed by the complainant (Belt Line) to interfere with the performance by any employee of said complainant (Belt Line) of his work and duties, and from, in any manner, endeavoring to induce such employee to desist from performance of his regular duties." The original injunction having expired prior to the rendition of this opinion, it was continued in effect by this Court on appropriate motion.

In accordance with the laws of Virginia the injunction was granted by the state court *ex parte*. The defendants have removed the action to this Court.

The ultimate question turns upon the validity of the threatened strike under the facts of this case. If the defendants were lawfully entitled to call for the work stop-

page as of September 26, 1956, the injunction must be dissolved. If otherwise, the injunction must remain in effect, at least pending further proceedings from an administrative standpoint.

Many of the essential facts are not in dispute. The carrier is a switching terminal railroad maintaining and operating yards in what may be described as Port Norfolk and Berkley. The Brotherhoods, all unincorporated associations and subordinate lodges of national organizations, serve as collective bargaining agents for their respective members, and, as such, are labor organizations and representatives within the meaning of the Railway Labor Act, 45 U. S. C., Sec. 151 *et seq*. The carrier owns tracks within the Cities of Portsmouth, South Norfolk and Norfolk, as well as in the County of Norfolk. It has also obtained certain operating rights over portions of the tracks of the Norfolk Southern Railway and Virginian Railway. It renders interchange service to nine railroads serving this area, and directly serves many large and vitally important industries, including the Norfolk Naval Shipyard and the United States Army Base. Suffice it to say that a work stoppage on the line of the carrier would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved.

The foundation of this controversy lies in the carrier's change of location for starting and relieving its crews. For many years the carrier has been starting and relieving its crews in two localities, one at Sewells Point in the northern end of the City of Norfolk, and the other at Port Norfolk which is located in the City of Portsmouth. In 1941 the carrier designated Money Point, a section of Norfolk County devoted largely to substantial industries, including the manufacture of fertilizer, as a place for

going on and off duty. The employees so designated and required to travel to and from Money Point filed claims for time compensation in traveling and reimbursement for expenses. These claims were handled "on the property" and finally denied by the President of the carrier line. The claims were *not* taken to the National Railroad Adjustment Board, First Division, and the Money Point reporting station was thereafter abolished the following year.

The so-called Berkley yard is the hub of the wheel. Trains going to Sewells Point and Port Norfolk pass through the Berkley yard but thereafter travel in divergent directions. As the carrier has heretofore used steam locomotives, it was necessary to service the same at the end of each shift or tour of duty. Steam locomotives working in and out of the Berkley yard were returned to Port Norfolk for such servicing. For these reasons, the crew members operating trains in and out of the Berkley yard reported on and off duty at Port Norfolk, and rode on company time between the respective points on the locomotive which, on many occasions, traveled "light."

During the latter part of 1955 and early 1956, the carrier concluded to use Diesel locomotives in substitution for steam. The economy of the new operation is not seriously contested but, by reason of this change, it would no longer be necessary to return the locomotives from the Berkley Yard to Port Norfolk for servicing. To accommodate its crews the carrier erected, at the Berkley yard, a new building equipped with lockers, shower baths, toilets, etc. It also provided sufficient parking space for the employees who desired to travel to and from work by private automobiles.

It should be noted that, for many years, the carrier has provided free transportation on carrier's time from

Port Norfolk to the Ford Plant, to Money Point, and, in isolated instances, to the Berkley yard; such transportation being generally by station wagon owned by the carrier. As to the Ford Plant, this became necessary by reason of the Plant's activities requiring the immediate removal of an assembled automobile so as not to impede the output. To cause a break in time for a locomotive to go from the Ford Plant to Port Norfolk for the purpose of picking up a new crew, and thereafter return to the Ford Plant, would seriously disrupt plant operations. With reference to Money Point, the necessity for this practice arises only during the seasonal months when the fertilizer plants concentrated in that area are operating at full capacity. Transportation by station wagon to and from the Berkley yard is occasioned by emergencies, including the breakdown of a locomotive. The Court does not lend too much emphasis on the practices mentioned in this paragraph.

Having heard rumors to the effect that a change in the reporting and relief points was contemplated, the respective Chairmen of the Brotherhoods addressed a letter to the President of the Belt Line, dated November 25, 1955, and referred to under paragraph 11(a) of the answer, said letter having been introduced in evidence by stipulation of counsel. Stating the employees' position, it is said:

> "It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such an arrangement by arbitrarily creating an

additional reporting and relief point for yard crews at Berkley yard.

"It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Undoubtedly the wording of this letter created some feeling between the carrier and the representatives. It is certainly the prerogative of management to change the designated reporting points, but it is equally the prerogative of the employees to insist upon negotiation in matters involving "conditions of employment" and, in the event negotiations fail, the right to strike remains inviolate.

There are approximately twenty-five to thirty men who have heretofore been reporting at Port Norfolk and who, since the granting of the temporary injunction, are reporting and being relieved at the Berkley yard contrary to their wishes. Additionally, the evidence discloses that all employees within the units represented are now reporting as directed by the carrier, all of which is under protest as the employees would have gone out on strike but for the injunction. Included among the estimated twenty-five to thirty men previously reporting at Port Norfolk are eight men living in Norfolk, and undoubtedly it is far more convenient and less expensive for these men to report and be relieved at the Berkley yard. Furthermore, there are eight men living in Port Norfolk who have heretofore been regularly reporting at Sewells Point. As to these men, if their seniority permits them to secure the new jobs created in the Berkley yard, it is certainly more convenient and less expensive for them to report to the Berkley yard. It appears, therefore, that there are approximately nine to

fourteen employees (depending upon seasonal variations) who may be directly and adversely affected by the change to the Berkley yard.

By public conveyance the average time required for travel from Port Norfolk to Berkley, via toll tunnel, is one hour and ten minutes, with an expense of 42¢ each way. In the majority of instances, however, men use private automobiles.

The shortest route in time and distance, by private automobile, from the Port Norfolk yard office to the Berkley yard office, is through the toll tunnel involving an expense of 30¢ per trip for car and driver, plus 5¢ for each passenger, and a distance of 4½ miles each way. Via the toll bridge, known as the Jordan Bridge, the distance is approximately six miles, and the toll is 35¢ per round trip for car and driver, plus 5¢ each way for each additional passenger. The third alternative route is toll free but this requires an estimated 12 miles of travel one way. There are no tolls between Sewells Point and Berkley and any employees heretofore living in Norfolk and reporting at Port Norfolk would save a toll charge and approximately three miles of travel by reporting to the Berkley yard. Despite these apparent advantages to many of the employees, the answer to the ultimate question does not lie within the scope of such benefits.

The carrier did not immediately respond to the letter of November 25, 1955, due to the fact that its plans had not fully materialized. On February 9, 1956, the President of carrier requested a meeting in his office on the following day. The representatives attended this meeting at which time a letter, dated February 10, 1956, was delivered to them, signed by the President. In part, the letter states:

"It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any proposed changes in the company's program of operations is required."

After making reference to the various provisions of the several agreements relating to "point for beginning and ending day," the letter continues:

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above."

* * *

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended."

In essence, the provisions in the Schedule of Rates, Rules, and Regulations, effective December 1, 1941, are

the same with each class of employees involved herein. An example is here quoted as to Conductors and Brakemen under Article VI:

> "(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.
>
> "(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

At the conference of February 10 the President stated that he would not entertain any conference for the purpose of negotiating changes in working conditions, all of which is apparent from the tenor of his letter. No further "on the property" conferences transpired at that time. The Brotherhoods endeavored to secure the services of the National Mediation Board but, by letter dated March 5, 1956, the Board declined to docket the application at that time. Thereafter, on April 26, 1956, the carrier notified its employees by appropriate bulletins and advertisements that the contemplated change would be effective on May 2, 1956, and that commencing that day six of its thirty-four crews would be required to go on and off duty at the Berkley yard. The carrier invited bids on the new assignments in accordance with seniority rules.

The Brotherhoods forthwith called a general work stoppage effective May 2, 1956. Its representatives notified the National Mediation Board, which body, acting under Sec. 5, First (b) of the Railway Labor Act, 45 U. S. C. Sec. 155, First (b), proffered its services. The parties

thereupon agreed to allow all matters to remain in *statu quo* pending efforts to the Board to settle the controversy. Two mediators successively visited Norfolk and discussed the matter with the parties but without success. While the Court excluded the details of any "on property" conferences, as well as details of negotiations thereafter in Washington, it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. The right to make the change is conceded, but the Brotherhoods insist upon the right to negotiate with respect to any hardships created by such a change and, in view of the ultimate failure of negotiations, exercised its power to call a strike.

Subsequent negotiations before the National Mediation Board at Washington, D. C., similarly resulted in a failure of any agreement. A Mediation Agreement and Proposal was suggested by the Board, agreed to by the Brotherhoods, but rejected by the carrier; all of which was clearly within the carrier's prerogative. The Board, by letter dated July 30, 1956, made reference to other alternative procedures, including the availability of the National Railroad Adjustment Board or the creation, by agreement, of a special or system board of adjustment under the provisions of Sec. 3, Second, of the Railroad Labor Act. The carrier responded to this letter stating its position that the disagreement was a matter properly referable to the National Railroad Adjustment Board, First Division. Indeed, the carrier now insists that the National Railroad Adjustment Board must consider and act upon the matter before the Brotherhoods may exer-

cise the right to strike. Upon receiving the carrier's letter as summarized above, the Mediation Board, by telegram dated August 16, 1956, terminated its mediation efforts and closed its file, after having first been advised by the Brotherhoods that they were not agreeable to referring the dispute to the National Railroad Adjustment Board, or to a special board of adjustment. The Brotherhoods insist that the issue involved is one for negotiation, and, when negotiations fail, the right to strike exists.

The record does not indicate that either party offered to arbitrate the matter under 45 U. S. C. Sec. 157 and 45 U. S. C. Sec. 155, Third.

After waiting a period of thirty (30) days, the carrier posted a notice on September 21, 1956, to be effective at 7:00 A. M. on September 26, 1956, that the Port Norfolk reporting station would be abolished, and inviting bids for the new jobs at the Berkley yard. Three (3) days later the Brotherhoods notified the carrier that a strike had been called effective 7:00 A. M. on September 26, 1956. The state court injunction was then granted to the carrier.

The wording of the agreements between the carrier and the Brotherhoods is substantially identical to many other similar agreements which have been the subject of labor disputes of this nature. It is significant that, in the vast majority of cases considered by the National Railroad Adjustment Board, First Division, carriers have insisted that the matter now in controversy is classified under the heading of rules, rates of pay or working conditions, and that the National Railroad Adjustment Board is without jurisdiction. While the Adjustment Board has universally stated that it has jurisdiction over the dispute, the claims have been disposed of by a terse statement similar to the following:

"This dispute comes before the Division on the question of the reasonableness of designated point for going on and off duty, the determination of which is a matter of negotiation and the Division so holds."

For reference to the foregoing, see:

1. Award No. 10603, Docket No. 15422 (5/22/45).
2. Award No. 12035, Docket No. 15683 (3/23/48).
3. Award No. 14941, Docket No. 23829 (11/15/51).

In the instant case the carrier not only insists that the Adjustment Board has jurisdiction, but also contends that the individual employees must report at and be relieved from duty at the Berkley yard against their will and thereafter file and process their claims "on the property" and then through the Adjustment Board as a condition precedent to going out on strike. Counsel stated in oral argument that the time required for processing such matters may be as much as four to five years due to the condition of the docket of the National Railroad Railroad Adjustment Board, First Division. It would certainly be futile to proceed in such a manner and then be met with a brief statement to the effect that the matter was *one for negotiation*. Furthermore, the employees had filed no claims at the time of the issuance of the injunction and presumedly have filed none since that date. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction.

As heretofore noted the carrier has established a practice, custom and usage of reporting on and off duty at the Port Norfolk yard. It has provided transportation on carrier's time and expense via steam locomotive. Conceding

that the carrier had an absolute right to designate the Berkley yard as a reporting and relief point, does this not constitute a change in working conditions which is the proper subject of negotiation? That the parties did negotiate as to the alleged hardships arising by reason of the contemplated change can hardly be questioned. If the controversy is one which is truly the subject of negotiation, it may, of course, be settled only by a voluntary agreement between the parties. Management's inherent right to designate a change of locality for reporting and relief does not, in and of itself, exclude labor's right to demand that hardships arising therefrom be negotiated and, in the event of failure along these lines, to call for a work stoppage. Courts are not empowered to force the parties to enter into contractual agreements.

Under the provisions of Sec. 2, Seventh, of the Railway Labor Act, 45 U. S. C. Sec. 152, Seventh, it is said:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in Sec. 6 (45 U. S. C. Sec. 156) of this Act."

In the same section under "Tenth," it is provided:

> "That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

When we turn to Sec. 6 (45 U. S. C. Sec. 156), we find:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after terminaiton of conferences without request for or proffer of the services of the Mediation Board."

Technically at least, no official notice was given of any intended change in agreements pursuant to Sec. 6. The carrier has consistently taken the position that no such notice was necessary on its part. As heretofore noted, however, the alleged hardships arising from the contemplated change involving travel time and expense were the subject of negotiation before the Mediation Board and it is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. In this respect the present controversy differs from *New York Central R. Co. v. Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, decided May 1, 1956, which, at first blush, would appear to be a parallel case. In *New York Central* it is not contended that any practice, usage or custom had been established by the carrier wherein transportation had been provided on carrier's time to and from the actual place of work. It is further stated that New York Central was at all times ready and willing

to discuss, negotiate, mediate or arbitrate the problems growing out of the reallocation of work of the 35 employees involved by the change of yards. *New York Central* concerns only the positive assertion by the Brotherhoods that management may not make such changes without opening the avenue to further concessions totally aside from the hardships, if any, which may arise to the employees directly involved. In the instant case we have a practice, usage and custom established by the carrier which was about to be changed, with a reluctance on carrier's part to negotiate on the problems arising therefrom. Indeed, as defendants point out, there would be no occasion to negotiate the issues of "continuous time and transportation expense" unless defendants conceded that the carrier had the inherent right to make the change.

The intent and purpose of Sec. 6 of the Act is to fix a procedure for the commencement of conferences relative to changes in the agreement. The section was not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. *McMullans v. Kansas, Oklahoma & Gulf Rwy. Co.*, 10 Cir., 229 F. (2d) 50, certiorari denied, 351 U. S. 918. It can certainly be waived by the affirmative act of the parties when they have negotiated and failed to reach an agreement.

It is apparent that there is jurisdiction vested in the Adjustment Board under 45 U. S. C. Sec. 153, First (i), to consider disputes between employees and carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, conditioned that the disputes are first handled in the usual manner up to and including the carrier's chief operating officer; but, if the parties fail to adjust their differences in that manner, the disputes may be referred to the Adjustment Board by the petition of

the parties or either party. The law does not make it mandatory that such disputes concerning rates of pay, rules, or working conditions be referred to said Board.

From the foregoing it appears to this Court that the circumstances surrounding this dispute fall within the classification of a "major" dispute in law. To a limited extent it may be trivial, but it is distinguished from mere "grievances" which must go to the Adjustment Board. *Hughes Tool Co. v. National Labor Relations Board*, 5 Cir., 147 F. (2d) 69.

This brings into focus the recent apparently conflicting decisions from the Fifth Circuit in *Brotherhood of Railroad Train. v. Central of Ga. Ry. Co.*, 5 Cir., 229 F. (2d) 901, and the Seventh Circuit in *Chicago River & Indiana R. Co. v. Brotherhood of Rail. T.*, 7 Cir., 229 F. (2d) 926. Certiorari was granted by the United States Supreme Court in each of these cases on October 16, 1956. The ultimate decision by the Supreme Court may (but not necessarily so) clarify the existing confusion, but it would be improper for this Court to await same which may not be determined for many months. The issue in the cited cases turns upon the applicability of the Norris-LaGuardia Act, 29 U. S. C. Sec. 101-115; the Fifth Circuit, by a majority opinion, holding that the Act applied; with the Seventh Circuit ruling to the contrary. A portion of the Norris-LaGuardia Act provides (29 U. S. C. Sec. 108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534, Justice Rutledge delivered the unanimous opinion of the Court in holding that the Norris-LaGuardia Act required, as a prerequisite to the granting of an injunction, the exhaustion of the alternatives afforded by the Act and said:

> "It (the Act) sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting.
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> * * *
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> "Obviously, if the view of the Court of Appeals is right, the condition requiring 'every reasonable effort to settle' the dispute becomes a dead letter in railway labor disputes, since no more would be required by its terms in that application than is called for by the first condition which demands compliance with legal obligations. Respondent, however, while apparently agreeing with the Court of Appeals that compliance with one method is sufficient, relies not only upon its negotiation, but also upon its participation in mediation. This serves it in no better stead. The section is not disjunctive as to arbitration, but conjunctive as to negotiation and mediation. The case is one, so far as both language and policy go, of one or all."

Holding in the instant case that the matters in dispute are proper subjects of negotiation, that the parties have negotiated to no avail, that further compliance with Sec. 6 of the Railway Labor Act is unnecessary in view of prior failure of negotiations, that neither party has requested arbitration, that it is not incumbent upon defendants to resort to the Adjustment Board as a condition precedent to calling a strike, and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily,

the Court arrives at the conclusion that the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved.

Counsel for defendants will prepare an order to this effect, adopting this opinion as the Court's findings of fact and conclusions of law, which, after presentation to opposing counsel for inspection, shall be submitted to the Court for entry. The order shall include provision for the dismissal of this action as to Brotherhood of Locomotive Engineers, Lodge No. 331, which defendant was dismissed by agreement of counsel at the time of oral argument. Contemporaneously with the entry of an order dissolving the injunction, the Court will entertain a motion to reinstate the same upon the filing of a notice of appeal from the order of this Court. The disastrous circumstances resulting from a strike justify such action by the Court pending a final determination of the interesting legal questions by the appellate court.

(Sgd.) Walter E. Hoffman,

United States District Judge.

Norfolk, Virginia,
January 25, 1957.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(Decided August 23, 1957.)

HAYNSWORTH, Circuit Judge:

The carrier, Norfolk and Portsmouth Belt Line Railroad Company, sought in the Circuit Court of the City of Norfolk, and obtained, a temporary injunction against the Brotherhoods representing the members of its train crews and certain of their officers. The temporary injunction proscribed any strike or work stoppage on the lines of the carrier pursuant to a strike notice which was to have become effective on September 26, 1956, and which arose out of a controversy regarding the establishment of a new point at which five of the carrier's thirty-four train crews would be required to report for duty. Upon removal of the cause to the District Court of the United States and after a full hearing upon the merits, the District Court ordered the temporary injunction dissolved, though, by supplemental order, the execution of the Court's judgment was suspended pending this appeal by the carrier.

The carrier is a switching terminal and belt line railroad exclusively serving a large number of industries in the Norfolk area. It has interchange facilities with nine other railroads in the area and some of those other railroads are dependent upon it for interchange of their traffic with others. The carrier is engaged in interstate commerce and is subject to the Railway Labor Act. The defendants, the Brotherhoods, are the representatives of its train crews. The District Court found, and the record clearly establishes, that a work stoppage on the lines of the carrier would occasion irreparable damage to the carrier and to the public and would "substantially paralyze industry in the area involved."

The center of the carrier's lines is Berkley Yard, located in South Norfolk, Virginia. This is the largest classification yard of the company and from that yard branch lines run in several directions. One of them crosses the Southern Branch of the Elizabeth River to Portsmouth, Virginia, from which there are subordinate branches and yards, the principal yard in Portsmouth being known as Port Norfolk Yard. Another line runs from Berkley Yard northerly to terminals on the southern bank of the Eastern Branch of the Elizabeth River. Another of them runs eastwardly to a connection with the Virginian Railroad over the tracks of which, together with those of the Norfolk and Southern, the carrier has operating rights by use of which it serves industries in the City of Norfolk and by which it extends its lines all the way to Sewells Point on Hampton Roads north of the City of Norfolk. Yet another line, with subordinate branches, extends from Berkley Yard in a southerly direction a considerable distance along the Southern Branch of the Elizabeth River.

From 1897 until 1917, Port Norfolk Yard, in Portsmouth, was the sole point at which train crews reported for duty and were relieved. Facilities for servicing steam locomotives were maintained there and the maintenance and service necessities of those locomotives required that they be ordinarily returned to that yard at the end of each shift. In 1917 an additional point at which train crews reported and were relieved was established at Sewells Point. Prior to 1956, except for a short period in 1941-42, when Money Point Yard was a designated point for reporting and relief, Port Norfolk Yard and Sewells Point Yard were the only designated points at which train crews were required to report for duty or to be relieved from duty.

Prior to 1956, therefore, engine crews which were to work at Berkley Yard or out of Berkley Yard would re-

port for duty at Port Norfolk Yard in Portsmouth, to which the locomotive had been brought for servicing. There they picked up the locomotive and would proceed over the lines of the carrier to Berkley Yard or to their other points of work assignment. This travel in the carrier's locomotive after having reported in was, of course, at the carrier's expense and all members of the train crew were on a pay status from the time of reporting in.

The contracts between the carrier and the Brotherhoods, representing members of its train crews, provided that the carrier should maintain certain locker room, shower, toilet and other facilities at each point at which operating employees were required to report or be relieved. Such facilities were maintained only at Port Norfolk Yard and Sewells Point Yard. Upon occasion, it was necessary that operations be substantially continuous in the yards of the Ford Plant and in the servicing of certain fertilizer plants. Upon those occasions, and when the locomotive could operate in those areas for the duration of two full shifts without being brought in for servicing, crews were relieved at the locomotive at those places. Since none of the requisite locker room, shower or other facilities were maintained at those places, however, they could not have been designated as points for reporting and relief. Consequently, when such "footboard relief" was being practiced, the relief crew would report in at Port Norfolk Yard, and would be transported by automobile to the place where the engine was working, while the relieved crew would be returned to Port Norfolk Yard by the same conveyance. In emergency, relief of crews working locomotives at other places was similarly handled.

The record, however, disclosed that there never was any custom or practice of providing transportation of train crews on a pay status to and from areas of their residence

and any designated point for reporting and relief. On the contrary the record discloses that eight employees, residing in Portsmouth, were traveling on their own time and at their own expense all the way through South Norfolk and Norfolk to Sewells Point where they reported and were relieved. Conversely, eight other employees, residing in Norfolk or South Norfolk, were required to travel on their own time and at their own expense to Port Norfolk Yard in Portsmouth for reporting and relief.

As in substantially all of the contracts between railroads and Brotherhoods representing train crews, there was a provision in the applicable contracts here that there should be a designated point for going on duty and a designated point for going off duty. Each of the contracts further provides "the point of going on and off duty shall be governed by local conditions * * *."

Against this background, and upon the assumption that under the applicable agreements it had the right to establish additional points for reporting and relief so long as it provided the requisite facilities, the carrier in 1955 began to construct such facilities at Berkley Yard. It had decided to replace its steam locomotives with diesel locomotives. The diesel locomotives required less frequent servicing than steam locomotives so that by establishing Berkley Yard as a point for reporting and relief for certain of its crews the carrier could provide substantially continuous service in and out of Berkley Yard without the interruption which would be occasioned by having to send locomotives to Port Norfolk Yard for servicing and exchange of the crews.

The interested Brotherhoods, observing the construction of the facilities at Berkley Yard, on November 25, 1955, addressed a letter to the carrier in which they expressed their position that the carrier could not designate

Berkley Yard as a point for reporting and relief of any of the crews except with the consent of the Brotherhoods or by new agreements, requiring the assent of the Brotherhoods.

At the request of the carrier, representatives of the Brotherhoods met with the President of the carrier on February 10, 1956, at which time they were handed a letter, in which he referred to the provisions of the contracts and stated the position of the carrier that, under the applicable agreements, the designation of points for reporting and relief would be governed by local conditions in the light of operating requirements as determined in the sole discretion of management, that there was no restriction upon the carrier's right to establish additional points for reporting and relief and the exercise of that right was not dependent upon the prior consent of the Brotherhoods or the initiation by the carrier of any procedure under the Railway Labor Act. Consistent with its position that the matter, under the agreements, was subject to unilateral determination by the carrier, it declined to negotiate with the Brotherhoods.

On February 13, 1956, the Brotherhoods responded to the carrier's position with a letter in which they acknowledged the right of the carrier to move the point for reporting and relief within a locality, but denied that the carrier had the right, without their consent, to establish a point for reporting and relief in a locality in which no such designated point had previously existed. They reiterated their position that the carrier could not designate Berkley Yard as such a point without the conclusion, in advance of the change, of a new or supplemental agreement.

On the same day, the Brotherhoods sent a telegram to the Mediation Board:

"Serious situation existing on Norfolk and Portsmouth Belt Line Railroad as the result of Management arbitrarily moving terminal from Port Norfolk to Berkley a distance of approximately six miles without negotiating with committees. Request your Board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

By letter dated March 5, 1956, the Mediation Board declined to docket the application for mediation after observing that the terminal had not been moved from Port Norfolk to Berkley Yard though the carrier proposes to establish a new point for reporting and relief for certain of its crews.

On April 26, 1956, the carrier posted notices that effective May 2, 1956, Berkley Yard would be the designated point for reporting and relief for six of its thirty-four crews. It invited its employees to bid upon the jobs.[1]

The Brotherhoods promptly countered by advising the Mediation Board of a strike called to commence on May 2, 1956. Because of the "labor emergency" thus created, the Mediation Board proffered its services as it was authorized to do under Section 5, First of the Act. (45 U. S. C. A. 155, First.) The carrier agreed to maintain matters in *statu quo* during the mediation proceedings which followed. Mediators conferred with the parties in Norfolk, and, subsequently, representatives of all parties were summoned to

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[1] The carrier did not have divisional seniority lists. All of its employees of the same class, at whatever point they reported for duty, were carried on the same seniority list. Under the provisions of the applicable collective bargaining agreements each employee had the right to bid upon any job within his classification and new assignments were required to be posted for such bidding. Each job was awarded to the senior bidder. If there was no bid for a particular job, the carrier had the right, and was required, to assign the employee, within that classification, with the least seniority to the open job.

Washington where they conferred with a member of the Mediation Board. As a result of the efforts of the Mediation Board a number of proposals were made both by the carrier and by the Brotherhoods to settle the controversy. None of these proposals was acceptable, however.

The Mediation Board then addressed letters dated July 30, 1956, to the parties, in which it was stated:

> "The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.
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> "The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them."

In response, the carrier advised the Mediation Board that its position always had been and still was that any claims arising out of the designation of Berkley Yard as a new point for reporting and relief should be referred to the Railroad Adjustment Board. The Brotherhoods, however, advised the Mediation Board that they would not agree to refer the controversy to the Railroad Adjustment Board nor would they create by agreement a special or system board of adjustment under Section 3 of the Act. (45 U. S. C. A. § 153.) Accordingly, under date of August 16, 1956, the Mediation Board addressed telegrams to the parties advising them that its efforts to mediate the dispute had been terminated.

On September 21, 1956, over thirty days after the Mediation Board had closed its file, the carrier posted a notice that effective September 26, 1956, five of its train crews would thenceforth report for duty and be relieved at Berkley Yard. Again the Brotherhoods countered, advising the carrier that a strike had been called to commence on the morning of September 26, 1956.

By virtue of the temporary injunction the strike was postponed, but Berkley Yard became the effective point for reporting and relief for five of the train crews on September 26, 1956.

Though the record clearly establishes that at least sixteen of the employees could report to Berkley Yard more conveniently and at less expense to themselves than at their previously designated points for reporting and relief, no employee bid upon the jobs at Berkley Yard. It is clear that the Brotherhoods and its members regarded the establishment of Berkley Yard as a point for reporting and relief as an unlawful change by the carrier in working conditions and it would appear that it was for that reason that no bids were received for these jobs. In consequence the jobs at Berkley Yard were filled by the carrier's assignment of employees of lowest seniority, without regard to their residences.

Thereafter the carrier submitted the controversy to the National Railroad Adjustment Board. That proceeding is now pending.

The historic difference between "major" and "minor" disputes, as those terms have long been known and understood in railroad labor controversies, is clearly delineated in the Railway Labor Act, and different procedures are provided for their determination.

"Major disputes," encompass those differences arising out of proposals for new contracts or of changes in existing

contractual or legal obligations and relations. Since such differences cannot be composed by reference to existing agreements or obligations, but only by a new agreement, the Act provides procedural steps and machinery designed to encourage and facilitate agreement. The parties are required to negotiate (§ 2, Second, 45 U. S. C. A. 152, Second), after which either party may invoke the services of the National Mediation Board (§ 5, First, 45 U. S. C. A. 155, First). If the mediation procedures are unsuccessful, the Mediation Board must, as its "final required action," endeavor to obtain an agreement to submit the controversy to arbitration (§ 5, First, 45 U. S. C. A. 155, First) and, if the dispute is still unsettled but threatens such interference with interstate commerce as to deprive any section of the country of essential transportation services, the Mediation Board is required to notify the President, who, in his discretion, is authorized to create an emergency board to investigate and report upon the dispute (§ 10, 45 U. S. C. A. 160). As was said by Mr. Justice Rutledge, speaking for the court in *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 725, 65 S. Ct. 1282, 1291, 89 L. Ed. 1886, 1895:

> "* * * Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

"Minor disputes," on the other hand, are grievances and other differences arising out of the application or interpretation of pre-existing agreements and obligations. Since

their resolution is not dependent upon a new agreement of the parties, machinery is provided by which such disputes may be decided, if the parties themselves cannot settle their differences. Strikes, or other forms of self-help, are neither contemplated nor permissible. *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Terminal Railway Company*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722. When minor disputes arise, the Act requires direct negotiation between the parties as the first procedural step (§2, Second, 45 U. S. C. A. 152, Second). If a "labor emergency" is found to exist, the Mediation Board may proffer its services (§ 5, First 45 U. S. C. A. 155, First), but jurisdiction is conferred upon the National Railroad Adjustment Board (or, by agreement, special or system boards of adjustment) to determine the controversy. Unsettled "minor disputes" may be referred to the Adjustment Board by either party. An award, other than one of money, of the Adjustment Board is binding upon all of the parties. If there is noncompliance with an award, a suit may be maintained in an appropriate District Court where the award must be accepted as prima facie evidence of the facts and findings recited in it. (§ 3, First (i), (m), and (p), 45 U. S. C. A. 153, First (i), (m), and (p).)

The issue framed, negotiated and mediated by the parties here was a minor dispute, which, upon failure of the parties to agree, was referable to the National Railroad Adjustment Board for final determination. The Brotherhoods clearly stated their position in their letters of November 25, 1955, and February 13, 1956, that, under the existing agreements, the carrier could not establish Berk-

ley Yard as a point for reporting and relief of any of its crews except with the consent of the Brotherhoods. They were standing upon the legal position that, in the absence of a new agreement requiring their assent, the establishment of a point for reporting and relief at Berkley Yard would constitute a violation by the carrier of § 2, Seventh, and § 6 of the Act (45 U. S. C. A. 152, Seventh, 156), which, for convenience, are set forth in the margin.[2] With equal clarity, the carrier in its letter of February 10, 1956, asserted its position that its proposed action was within its managerial prerogative as established in the existing agreements, which it had the unconditional and unilateral right to exercise. The existing agreements, according to the stated position of the Brotherhoods, prohibited the action, while, in the carrier's view, they authorized it.

The learned District Judge in holding that, while the carrier had the right to designate Berkley Yard as an additional point for reporting and relief, the Brotherhoods had a concomitant right to insist upon prior negotiation and

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[2] § 2, "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

§ 6, "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

other procedures looking toward a new agreement covering what they anticipated as the resultant changes in working conditions, apparently, was of the view that the decision was one for joint determination in the first instance. That was the position of the Brotherhoods in the issue as framed, for they were insisting that a new or supplemental agreement was a precedent requisite to the effectuation of the change. It was not, however, the position of the carrier and the difference between the parties, which was the issue framed, related entirely to their contractual rights and obligations under the existing agreements.

To understand the nature of the controversy we should bear in mind the recognized distinctions between decisions of different nature and the means of effectuating them under collective bargaining agreements. The differences in the nature of the major classes of decision and the resultant differences in provisions for their resolution and effectuation are clearly pointed out in *Regulation of Collective Bargaining By the National Labor Relations Board*, by Archibald Cox and John T. Dunlop, 63 Harvard Law Review 389, 401. They are highlighted in the opinion of the Court in *NLRB v. American National Insurance Co.*, 343 U. S. 395, 72 S. Ct. 824, 96 L. Ed. 1027.

A great majority of the collective bargaining agreements, by express provision or by implication, confer upon management the right and the power to make certain decisions without prior consultation with the representatives of the employees and to effectuate them in practice without the delay inherent in extended ollective bargaining procedures. Among the decisions generally regarded as falling within this class are the type of product to be produced, the location of plants, the installation of new machinery and equipment and similar matters. All of such decisions when effectuated have a resultant effect upon

working conditions and are of interest to employees and their representatives. They are none the less regarded as being within the prerogative of management alone to decide and effectuate in the first instance. Some collective bargaining agreements place in this category of decision many other matters, and it has been held that it is not an unfair labor practice for an employer to insist upon the inclusion in a collective bargaining agreement of a "management functions" clause of very broad scope. *NLRB v. American National Insurance Co.*, 343 U. S. 395, 72 S. Ct. 824, 96 L. Ed. 1027. It has recently been held that a carrier's closure of a freight yard falls within this class of decision. *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 6 Cir., ____ Fed. 2d ____ affirming *New York Central Railroad Company v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273.

In the issue framed in this case, it clearly was the contention of the carrier that under the existing agreements the designation of a new point for reporting and relief was within this classification. It not only clearly so stated but it insistently refused to negotiate in advance regarding the change until the intervention of the Mediation Board. If the carrier was correct in this contention, its unilateral action would not constitute a violation of § 2, Seventh, or of § 6 of the Act for the prohibitions of those sections fall short of unilateral changes made in accordance with the terms of the applicable agreements and are limited to changes in those working conditions which are embodied in the agreement. See *Williams v. Jacksonville Terminal Company*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318.

There is a second class of decision which, under collective bargaining agreements, can be resolved only by the

joint determination of management and representatives of the employees. Included in this class of decision are those things ordinarily specifically covered in collective bargaining agreements. They include wages, hours of employment, seniority rights, grievance procedures, and similar matters.

If a matter falls within the second class of decision, under the Railway Labor Act and under the applicable agreements, the carrier can make no change without initiating negotiation by giving the notice required under Section 6 of the Act and participating in the subsequent procedures available in aid of settlement of a "major dispute." If at the conclusion of all of the required successive steps there is neither agreement between the parties upon the merits nor agreement to submit the controversy to arbitration, but only then, the carrier can effectuate the change and the Brotherhoods are free to strike.

There is yet a third major class of decision which is subject to determination solely by the representatives of the employees or the membership of those organizations, but we are not here concerned with that class of decision.

The generally recognized differences in the nature of the several classes of decision and the appropriate means of effectuating each are founded upon important considerations. The installation of new machinery, for instance, is a decision which management should be more qualified to make than the representatives of employees. The making of the decision and its effectuation, without delay, may be imperative if competitive conditions are to be met and the interest of both employer and employees are to be served in the long run. That the employees have no right to participate in the making of such decisions, or to condition their effectuation upon prior negotiation and other procedural steps looking toward new contractual rights and

obligations, does not mean that the employees and their representatives are without rights. After the effectuation of such decisions of management, the employees and their representatives are free to take such action, within the confines of existing agreements, as they may feel appropriate in the light of the changed situation.

Here then, the carrier was clearly contending that the establishment of Berkley Yard as an additional point for reporting and relief was a decision within the first category. It founded its argument upon the terms of the existing agreements and insisted that it would not negotiate with the Brotherhoods prior to the accomplishment of the change.

On the other hand, the Brotherhoods were insisting that the decision was one within the second class mentioned above, which could be effected only after resort to the appropriate collective bargaining procedures provided in aid of settlement of proposals for a new or supplemental agreement.[3]

The controversy thus was centered upon the nature of the decision. The difference was whether, under the existing agreements, it was within the exclusive power of management, acting unilaterally, to make and effectuate the change or whether effectuation of the change might be

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[3] The District Court seemed to find it material that the Brotherhoods after recording their position that the change could not be made without their assent, subsequently stated that it could be done only after the negotiation of a new agreement to take care of anticipated hardship. The difference is not substantial; however, for in either event the essence of the position of the Brotherhoods was that the decision fell within Class 2 and could not be effectuated by the carrier except by the carrier's invocation of all of the procedures provided in aid of settlement of a "major dispute," and if these did not result in an agreement upon the merits or an agreement to arbitrate, the Brotherhoods would have the right to strike, all in advance of the effectuation of the decision.

conditioned by the Brotherhoods upon negotiation and other procedures looking toward a new or supplemental agreement. Since it thus arose out of a difference of opinion as to the interpretation or application of the existing agreements, it was a "minor dispute" subject to final determination by the National Railroad Adjustment Board. Evidently for that reason, the Mediation Board refused to docket the case upon the application of the Brotherhoods, though when it later found that a labor emergency existed it proffered its services, but, in terminating its efforts, referred the parties to the jurisdiction of the Adjustment Board.

We are not concerned with the merits of that controversy. Whether the carrier was correct in its interpretation of the agreements as giving it the right to accomplish the change without prior agreement or negotiation, as the Brotherhoods in this Court apparently concede, or whether the Brotherhoods were correct in their original position that they had the right, under the agreements, to insist that the carrier take the initiative in processing a "major dispute" as a condition precedent to the change can be determined only by the Railroad Adjustment Board. Our task is only to discover the nature of the issue as framed and defined by the parties and the treatment subsequently accorded it by the parties and the Mediation Board.[4]

Since the dispute is a minor one subject to final determination by the Adjustment Board, to which it has been submitted by petition of the carrier, the threatened strike should be enjoined. *Brotherhood of Railroad Trainmen v.*

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[4] There is nothing to indicate that either party was insincere in the assertion of the conflicting interpretations of their rights and obligations. Nor was the carrier's position founded upon such insubstantial grounds as to amount to an apparent attempt to circumvent the prohibitions of § 2, Seventh, and § 6 of the Act.

Chicago River and Indiana Railroad Company, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Railway Company*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722.

The Brotherhoods contend, however, that, at some point in the proceedings, they changed their position. They now concede that the carrier was correct in its position on the issue framed by the letters and that it, "in the exercise of its managerial prerogative, and without regard to the wishes of the Brotherhoods, has the inherent right as management to change the designated point of reporting and relief." In the testimony, witnesses for the Brotherhoods made the same concession stating additionally, that they had not sought to negotiate, as such, the question of the right of the carrier to make the change but had sought a new "agreement to cover the hardship and expense imposed on the men by this change." They conclude that, having gone through the steps of negotiation and mediation in an effort to obtain a new agreement (a "major dispute"), they are now free to strike in aid of their demands.

This belated concession of the correctness of the legal position of the carrier, however, did not come earlier than the hearing on the merits in this case, long after all negotiation and mediation had terminated. In their answer in this case, the Brotherhoods alleged that the change to Berkley Yard as the point for reporting and relief of some of the crews "does constitute a change in working conditions within the meaning of Section 2, Article 7, of the Railway Labor Act requiring the complainant to give the defendants notice of such change pursuant to Section 6 of the Railway Labor Act, and requiring negotiations by complainant and defendants to establish working conditions applicable to such change." They further alleged that the letters of November 25, 1955, and February 13, 1956,

which framed the issue as a "minor" one, evidenced their "repeatedly announced position." Moreover, their earlier position as to the legal rights of the parties was implicit in their telegram of February 13, 1956, to the Mediation Board in which they referred to the "serious situation * * * as the result of management arbitrarily moving terminal * * *." The Mediation Board, itself, apparently so regarded it, for had it been recognized as a "major dispute" arising out of new contract proposals by the Brotherhoods, the Mediation Board would not have declined to docket the case upon the application of the Brotherhoods nor, in terminating its efforts, would it have urged the submission of the controversy to the Railroad Adjustment Board or the creation of a special board of adjustment.

The District Judge excluded evidence of the details of the proposals made by the parties during the stage of mediation, but the record contains abundant evidence that they were concerned with free transportation and travel time pay for employees, residing in Portsmouth, who would report for duty and be relieved at Berkley Yard. The subject of the proposals, however, does not define the issue or establish the nature of the dispute. If the "minor" issue, as framed, was to be negotiated and mediated, the successive proposals would not take the form of endless argument of the conflicting legal positions of the parties, but that of practical compromise. The legal differences as to the unilateral right, under the existing agreements, of the carrier to establish Berkley Yard as an additional point for reporting and relief could be finally determined only by the Railroad Adjustment Board. Any compromise necessarily would concede something to the demands of the Brotherhoods that their consent to the establishment of Berkley Yard as an additional point for reporting and relief must be purchased by payment of travel time and

free transportation to and from Port Norfolk Yard and Berkley Yard.[*]

The subject matter of the proposals during negotiation and mediation adds no support to the contention of the Brotherhoods that a new rule was proposed, negotiated and mediated. On the contrary, the refusal of the Brotherhoods to accept the change, without concessions acceptable to them, suggests firm adherence to their stated view that the carrier could not lawfully make the change without their consent, a position they reiterated in their answer in this case.

If the present concession of the Brotherhoods was manifested earlier than the hearing on the merits in this case, they would have accepted, not opposed, the proposed change in the point of reporting and relief for some 25 to 30 of the 172 employees involved, reserving the right to propose such rule changes as seemed appropriate. Indeed, their very insistence, upon a previously negotiated new rule emphasized their stated position that the controversy was one of denial of the contractual right of the carrier to effectuate the proposed change. The record conclusively establishes that the change would be very advantageous to 16 of the 25 to 30 employees involved. Since Berkley Yard is located immediately across the Southern Branch of the Elizabeth River from Portsmouth and since Port Norfolk Yard is in the northern portion of Portsmouth, it is by no means certain that Berkley Yard is less accessible to all residents of Portsmouth than is Port Norfolk Yard. The distance between the two yards by the most direct route (toll tunnel) is 4½ miles, but Berkley Yard is closer and

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[*] The demands of the Brotherhoods apparently would apply to those residents of Portsmouth who, on their own time and at their own expense had been travelling the much longer and costlier route to report at Sewells Point Yard. If operations were to be continuous at Berkley Yard, travel time pay would likely be at premium rates.

possibly more accessible to some areas of Portsmouth than is Port Norfolk Yard. Only by acceptance of the proposed change and permission of its members to freely bid on the Berkley Yard jobs in accordance with the existing agreements and seniority rules could it be determined what, if any, hardship might be imposed upon residents of Portsmouth by the change.

Under such circumstances, if the Brotherhoods had regarded their legal position to be what they now concede, they should have awaited the event, accepting the change as the admitted right of the carrier, and, after ascertaining what hardship ensued, proposed such rule changes as they felt appropriate. *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 6 Cir., Fed. 2d (decided June 14, 1957), affirming *New York Central Railroad Company v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273.

The New York Central case is strikingly similar to the one here. There the New York Central proposed to close its North Toledo Yard. It acted upon the assumption, which the court found to be correct, that, under the existing agreements it had the absolute right to do so. That right was challenged by the Brotherhoods who took the position that the yard could not be closed until a new agreement, covering all of the anticipated problems and hardships involved in the reassignment of employees, had been concluded and that § 6 of the Act cast the burden upon the carrier to initiate negotiations looking toward such an agreement. When the controversy developed into a "labor emergency" the Mediation Board proffered its services, which were accepted, and extended efforts to mediate and compromise the controversy followed. They were not successful and the Mediation Board closed its file. The Brotherhoods gave notice of a strike, and the court issued an injunction. Up-

holding the legal right of the carrier to close the yard, the court held that anticipated hardship in the reassignment of employees was a "separate and distinct problem that may be met when the time arrives," but was not presently a labor dispute upon which a strike might lawfully be founded.

Bargaining for compensation for anticipated hardships which may never be incurred and the extent of which is unknown is difficult at best. When further complicated by the fact that the primary issue was the conflict in the legal postulates of the parties, it is not surprising that agreement could not be reached.[6] Certainly, the failure of agreement under those conditions does not suggest that, if special hardship does result from the change to Berkley Yard, appropriate agreements cannot be concluded.

If "the moral force of public opinion (is the) ultimate sanction" of the Act in the disposition of "major disputes," it is incumbent upon the parties to submit themselves to the successive procedures of the Act before resorting to self-help. *Virginian Railway Company v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886. These procedures are

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[6] The negotiation required by the Act is the same "good faith" bargaining required by the Labor Management Relations Act. *Brotherhood of Railway Trainmen v. Toledo, Peoria & Western Railroad*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534. Under the latter act bargaining from a legally erroneous premise may be held an unfair labor practice. *Taylor Forge & Pipe Works v. NLRB*, 7 Cir., 234 Fed. 227. See also, *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 76 S. Ct. 753, 100 L. Ed. 1027; *NLRB v. Darlington Veneer Company*, 4 Cir., 236 F. 2d 85. It may be that, without questioning the sincerity of their conviction of their legal rights, which they apparently now concede to have been erroneous, the bargaining did not satisfy the substantive requirement of negotiation imposed upon the Brotherhoods by the Act.

ordinarily initiated by giving the notice of proposed changes in agreements required by Section 6 of the Act (45 U. S. C. A. 156). The Brotherhoods did not comply with Section 6. Nor can we say that the carrier waived the requirements of that Section when it subsequently participated in mediation, for the issue framed was a "minor" one to which Section 6 is inapplicable. Indeed it was handled as such, and all of the mandatory procedures in aid of settlement of "major disputes" have not been completed.

If by a tardy change in its legal position, a party could convert a "minor dispute" processed through the procedures applicable only to those disputes, into a "major dispute" fully processed, the mandatory provisions of the Act in aid of settlement of "major disputes" would be circumvented and the public denied those safeguards against interruptions of service, the establishment of which was the major purpose of the Act. The concession of the Brotherhoods to the legal position of the carrier upon the "minor issue" may have made moot the pending proceeding before the Adjustment Board, but it cannot leave them free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a "major dispute" under the required procedures of the Act.

Since the issue framed and processed by the parties was a "minor" one, resort by the Brotherhoods to a strike was not lawful and a permanent injunction should be entered. The injunction will be without prejudice to the right of any party to process, under applicable provisions of the Act, any dispute which, properly framed, may arise out of the factual situation, or to apply to the District Court for such further orders as may be appropriate in the light of this opinion.

Reversed and Remanded.

JUDGMENT OF THE COURT OF APPEALS.

(Filed August 23, 1957.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for the entry of appropriate orders in accordance with the opinion of the Court filed herein.

MORRIS A. SOPER,
United States Circuit Judge.

SIMON E. SOBELOFF,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

ORDER OVERRULING PETITION FOR REHEARING.

(Filed September 30, 1957.)

The petition for rehearing in this case has been read and considered and the Court is of the opinion it is without merit. It is therefore ordered this day of September, 1957 that the petition be and is hereby overruled.

MORRIS A. SOPER,
United States Circuit Judge.

SIMON E. SOBELOFF,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 622.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, *et al.*,

Petitioners,

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITIONER'S REPLY BRIEF.

ROBERT R. MACMILLAN,
621 Bank of Commerce Building,
Norfolk 10, Virginia,

WAYLAND K. SULLIVAN,
Standard Building,
Cleveland 13, Ohio,

RUSSELL B. DAY,
622 Keith Building,
Cleveland 15, Ohio,

HAROLD C. HEISS,
622 Keith Building
Cleveland 15, Ohio,

Attorneys for Petitioners.

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NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITIONER'S REPLY BRIEF.

The petitioners believe that a reply to the respondent's brief is justified because the respondent seeks to bring this case within the holding in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30, and avoid the decision in *Manion v. Kansas City Terminal Railway Co.*, 353 U. S. 927, by asserting a conclusion that is clearly *not* justified by the facts of this case. This conclusion appears on pages 8 and 9 of respondent's brief and is stated as follows:

> "They (petitioners) lose sight of the fact that the injunction granted was a temporary one, granted to preserve, for a reasonable time, the status quo, *in order that the controversy might be submitted to the Adjustment Board.*" (Emphasis ours.)

In short, the respondent seeks to convey the impression that, following the attempt of the parties to settle

their dispute by direct negotiation, a race ensued between the employees and the respondent because of the haste of the former to withdraw from their employment and the effort of the latter to submit the dispute to the National Railroad Adjustment Board before the strike could be made effective.

Does the record justify this representation? The pertinent facts are as follows.

Bargaining conferences and correspondence had been conducted over a considerable period between the respondent carrier and the representatives of its switching crews regarding the right of the carrier to change the designated place for its switching crews to report for duty and be relieved from duty. At the beginning of the dispute the parties were in disagreement over the meaning of certain rules on the subject of crews reporting for duty that are contained in the enginemen's and trainmen's collective agreements. (Appellant's App. pp. 63-71.) The efforts of the parties to reach agreement failed. The employees tried on February 13, 1956, to invoke the mediatory services of the National Mediation Board, but the Board declined to assume jurisdiction of the dispute, and on April 26, 1956, the respondent posted notice on its bulletin board that its decision to change the place where crews were to report for work would be put into effect May 2, 1956. The next day, April 27, 1956, the employees' representatives announced that the employees would strike on May 2, 1956. This announcement could not fail to have informed the respondent that the employees took a serious view of the respondent's refusal to settle the dispute and its persistence in enforcing the rules according to its own views.

The National Mediation Board thereupon entered the dispute because a "labor emergency" was found to exist,

the strike was postponed, and the parties were invited by the Board to come to Washington. Late on July 23, 1956, an agreement designed to settle the dispute was proffered to the parties by the Board. It was approved and signed by the employees' representatives on July 24. (Appellant's App. p. 23.) The respondent's president withdrew from the conference on July 24 and returned to Norfolk to consult with others on the advisability of signing the agreement. (Appellant's App. pp. 71-73.)

The next day, July 25, 1956, the respondent's president notified the Mediation Board by letter that the carrier was rejecting the "Mediation Agreement and Proposal" and thanked the Board for its efforts to bring the parties to agreement. (Appellant's App. p. 72.)

This action by the respondent ended all efforts by the parties to compromise and settle the dispute, and the respondent could not fail to know that its rejection of the proposed "Mediation Agreement" and a persistence in enforcing its own views would be followed in due time by a reannouncement of the employees' earlier decision to strike.

The Mediation Board did not formally advise the parties that it was closing its file on the dispute until three weeks later, in a telegram dated August 16, 1956. (Appellant's App. p. 29.) The situation on the property remained in statu quo for more than thirty days longer, in compliance with the requirement of Section 5, First, of the Railway Labor Act.*

On September 21, 1956, the respondent advised the employees that its decision to change the place where crews must report for work would be put into effect on September 26, 1956.

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* 45 U. S. C. Sec. 155, First.

The employees countered with a notice to the respondent on September 24, 1956, advising that the employees would strike two days later, on September 26.

On the same day that the employees notified the respondent that a strike would take place, to-wit, on September 24, the respondent was prepared with a sixteen page mimeographed complaint in which was detailed the history and the issues of this dispute. It filed the complaint in the Circuit Court of Norfolk, Virginia, and also obtained a temporary injunction against the strike before the close of that same day.

The respondent did not get around to submitting the dispute to the National Railroad Adjustment Board until December 17, 1956.

From July 25 to September 24, 1956, a period of two full months, the respondent could not fail to realize that it must anticipate a strike by its employees over this dispute. This is true because the employees had already formally declared their intention to strike if the respondent persisted in its ex parte decision to change the established place for crews to report for work. It is true for the further reason that the respondent could not fail to know that its rejection on July 25 of the Mediation Agreement would be the end of efforts by either party to resolve the dispute by peaceful negotiation. It may further be assumed that the respondent knew its own mind, which is to say, that it did not intend to abandon its decision to change the place for crews to report for duty unless its plans were forcibly interfered with.

The respondent knew on July 25, 1956, that many weeks would elapse before the necessary chain of events could transpire that would precipitate a renewal of the employees' declaration to strike. Moreover, it is fair to

say that the respondent has, in effect, admitted its awareness that the strike threat would be renewed, by the fact that on the day the employees announced their intention to strike the respondent was able to go to court equipped with an elaborate complaint detailing the history of this dispute.

It is in the light of the foregoing facts and considerations that the respondent says to this Court that it needed the temporary injunction to preserve the status quo "*in order that the controversy might be submitted to the Adjustment Board.*"

We suggest that the assertion is manifestly not true.

The respondent, at the time it obtained the temporary injunction from the Circuit Court of the City of Norfolk on September 24, 1956, had already had two months to prepare its submission to the Adjustment Board. During that period it chose, rather, to prepare its complaint for injunction, which was in form for filing on the day the employees announced their intention to strike. Patently, if equivalent energy had been devoted to the preparation and filing of a submission to the Adjustment Board, the pendency of the dispute before the Board could have been established prior to the strike date and the factual situation in the instant case would have come within the purview of the *Chicago River and Indiana* decision.

As a matter of uncontroverted fact, at the time the strike was called—September 24, 1956—respondent railroad had neither filed a submission with the adjustment Board nor indicated an intention so to do. The Mediation Board had closed its file on August 16, 1956. By law, the statutory restraint on the right of the employees to strike ended thirty days thereafter. Respondent permitted the right to strike to mature and a strike to be called on Sep-

tember 24 without having made a submission to the Board, despite its having had two months' interval to prepare this step.

Petitioners submit that under these circumstances the right to strike, which would have been exercised on September 26, 1956, but for the injunction, could not be obliterated by a subsequent submission to the Adjustment Board, as now contended by respondents and decided by the Court of Appeals.

The Questions Presented in the Petition For Writ of Certiorari Are Based Upon a Ruling Initially Made by the Court of Appeals and Challenged by the Petitioners at the First Seasonable Opportunity.

The trial of this case took place on October 9 and 10, 1956. The first and principal issue posed for decision by this trial concerned the character of the dispute in which the parties were involved—whether it should be classified as a "major dispute" or a "minor dispute." The respondent's position when before the District Court was that the dispute must be classified as a "minor dispute" and such dispute cannot be the subject of a lawful strike because the Railway Labor Act requires employees to submit such disputes to the National Railroad Adjustment Board.

The petitioners took the position that the dispute must be classified as a "major dispute," and hence there could not be the slightest doubt that a strike based upon a dispute of this character would be a lawful strike under the Railway Labor Act. The District Court sustained the position contended for by the petitioners, and the action was thereby resolved without reaching the issue of law involved in the *Manion* case.

The 90-day temporary injunction that was issued by the Circuit Court of the City of Norfolk was due to expire on or about December 24, 1956, and respondent's counsel appeared before the United States District Court to obtain an extension of the injunction. On this same occasion the respondent's counsel moved the court to allow respondent to supplement the trial record with evidence showing that the dispute had been submitted by the respondent to the Adjustment Board. The District Court refused the proffer on the ground that the record was completed and closed. The District Court also stated in its decision on the merits that the fact that some form of submission to the Adjustment Board had been made by the respondent was irrelevant, in view of the disposition of the case made by the Court's decision.

When the Court of Appeals for the Fourth Circuit reached its decision holding that the District Court erred in deciding that the dispute must be classified as a "major dispute," the question whether the Railway Labor Act deprives employees of the right to strike over "minor disputes" became for the first time in this litigation a pertinent question for the court to consider. The decision by the Court of Appeals to the effect that the proposed strike set for September 26, 1956, would have been an unlawful strike because a strike based upon a "minor dispute" is forbidden by the Railway Labor Act, made opportune for the first time a challenge by the petitioners to this proposition of law. And the challenge was asserted promptly in a petition for rehearing filed by the petitioners with the Court of Appeals.

The respondent opposes the granting of the writ of certiorari on the ground that this Court will not decide an issue that was not submitted to the District Court, save